

LAW OFFICES OF  
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IN CALIFORNIA, DISTRICT OF COLUMBIA,  
AND LOUISIANA ONLY

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May 20, 1994

BY HAND

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MAY 20 1994

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARYMr. William F. Caton, Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554Re: Second Report and Order  
PP Docket No. 93-253  
FCC 94-61  
Released April 20, 1994

Dear Mr. Caton:

Enclosed please find one original facsimile and eleven copies of a Petition for Reconsideration of the Commission's Second Report and Order, PP Docket No. 93-253, released April 20, 1994.

Please cause these documents to be filed with the Commission on behalf of William E. Zimsky.

If the staff should have any questions regarding this matter, please contact me.

Sincerely,

  
William E. Zimsky

Enclosures

No. of Copies rec'd 011  
List ABCDE

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
WASHINGTON, D.C. 20554

In the Matter of:

Implementation of Section 309(i)  
of the Communications Act -  
Competitive Bidding

PP Docket No. 93-253

To: The Commission

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**MAY 20 1994**

**PETITION FOR RECONSIDERATION**

**FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY**

William E. Zimsky ("Zimsky"), pursuant to Section 1.429(j) of the Commission's Rules, hereby respectfully submits its Petition for Reconsideration of the Commission's Second Report and Order, FCC 94-61, released April 20, 1994. In support whereof, the following is shown:

In the Second Report and Order, at ¶ 165, the Commission adopted a rule, 47 C.F.R. § 1.2105(a), requiring bidders to submit the applicable filing fee, as specified by 47 U.S.C. § 158(g), with their short form applications and certifications.

The rule imposing filings fees for filing short form applications for auctions should be deleted for two reasons. First, the Commission lacks the statutory power to impose such fees. In the alternative, if the Commission has such statutory power, such fees are unreasonable user fees which

constitute a taking of applicants' property without just compensation in violation of their Fifth Amendment rights.

First, 47 U.S.C. § 158(g) directs the Commission to impose a filing fee for filing certain applications. Nowhere in these schedule of filing fees is there any mention of the new short form application, which are merely a series of certifications that the applicant is qualified. Because there is no provision in Section 158(g) for imposing the filing fee for the new short form application, as set forth in the Second Report and Order, the FCC lacks the statutory authority to impose such a fee.

Second, the filing fees set forth in 47 U.S.C. § 158(g) were intended by Congress to recoup the cost of regulation, i.e., the cost of fully processing the application for which the filing fee is assessed. H.R. 99-300, 99th Congress 2d Sess. 506 (1986), U.S. Code Cong. & Admin. News 1986, p. 1021 (Congress implemented the Schedule of Charges "based on [the] cost of regulation"); Practice and Procedure; Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, Notice of Proposed Rule Making, 51 Fed. Reg. 25792, 25794 (¶19) (July 16, 1986) ("[e]ach fee is intended to recover only those costs attributable to providing the service to the public").

However, only the auction winner will submit a long form application and only the auction winner will have its application scrutinized to determine whether it is qualified

pursuant to 47 U.S.C. §§ 308(b), 309(a) and 310 to be the licensee for that particular market. Second Report & Order, at ¶ 199; 47 C.F.R. §1.2107.

Accordingly, to impose a filing fee on bidders who do not submit a long form application is unreasonable because the filing fee was designed to recoup the costs of fully processing the application for which the fee is assessed, a service which the losing bidders do not receive. Consequently, the Commission's proposed scheme is unconstitutional because a user fee which is not reasonably related to, or a fair approximation of, the cost incurred by the government in provide the service for which the fee is assessed, effects a taking. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 163 (1980) (a user fee violates the takings clause if "it is not reasonably related to the costs of using [the government service]"); United States v. Sperry Corp., 493 U.S. 52, 60 (1989) (a user fee is not a taking if it is a "fair approximation of the cost of benefits supplied," quoting Massachusetts v. United States, 435 U.S. 444, 463 (1978)).

Accordingly, Zimsky requests that the Commission reconsider its decision to require a the filing fee be submitted with short form application. Instead, the filing fee should be required only with the submission of the long form application tendered by the auction winner.

**RESPECTFULLY SUBMITTED,**

By: 

William E. Zimsky

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May 20, 1994